



**BILLING CODE 4333-15-P**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 21**

**[Docket No. FWS-HQ-MB-2013-0070; FF09M21200-134-FXMB1231099BPP0]**

**RIN 1018-AZ69**

**Migratory Bird Permits; Control Order for Introduced Migratory Bird Species in Hawaii**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** Introduced, nonnative, alien, and invasive species in Hawaii displace, compete with, and consume native species, some of which are endangered, threatened, or otherwise in need of additional protection in order to increase or maintain viable populations. To protect native species, we establish a control order for cattle egrets (*Bubulcus ibis*) and barn owls (*Tyto alba*), two invasive migratory bird species in Hawaii, under the direction of Executive Order 13112. We also make available the supporting final environmental assessment, the finding of no significant impact, and public comments for this control order.

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF

**PUBLICATION IN THE FEDERAL REGISTER].**

**FOR FURTHER INFORMATION CONTACT:** Jerry Thompson, at 703–358–2016.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The U.S. Fish and Wildlife Service (Service) is delegated with the primary responsibility of conserving migratory birds through protection, restoration, and management. This delegation is authorized by the Migratory Bird Treaty Act (MBTA) (16 U.S.C. 703 et seq.), which implements conventions with Great Britain (for Canada), Mexico, Japan, and the Soviet Union (Russia). We implement the provisions of the MBTA through regulations in parts 10, 13, 20, 21, and 22 of title 50 of the Code of Federal Regulations (CFR).

Regulations pertaining to migratory bird permits are at 50 CFR part 21. Subpart D of part 21 contains regulations for the control of depredating birds. Depredation and control orders authorize the take of specific species of migratory birds for specific purposes without a Federal depredation permit, as long as the control and depredation actions comply with the regulatory requirements of the order. Depredation orders are generally established to protect human property, such as agricultural crops, from damage by migratory birds, and we issue control orders to protect natural resources. To protect native species in Hawaii, we are adding a control order to part 21 at §21.55 for cattle

egrets (*Bubulcus ibis*) and barn owls (*Tyto alba*), two invasive migratory bird species in Hawaii. The terms “introduced,” “native species,” “alien species,” and “introduced species” are used in this document as defined in Executive Order 13112, “Invasive Species” (64 FR 6183; February 8, 1999).

## **II. Comments on the Proposed Rule or the Draft Environmental Assessment**

In the proposed rule published on November 4, 2013 (78 FR 65955), we requested that all interested parties submit written comments on the proposal by February 3, 2014. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. During the public comment period for the proposed rule, we received 117 letters addressing the proposed control order for cattle egrets and barn owls in Hawaii. One commenter was from a Federal agency, eight commenters were from nongovernmental organizations, and 107 commenters were private citizens. Seventy-four commenters were opposed to the proposed rule. Seventeen commenters partially supported the proposed rule; fifteen of these commenters supported control of cattle egrets but not of barn owls, while two commenters supported control of barn owls but not cattle egrets. Twenty-five commenters were in favor of the proposed rule.

In this final rule, all substantive information relating to the implementation of a control order for cattle egrets and barn owls in Hawaii has either been incorporated

directly into this final determination or is addressed in the summary, below. All comment letters and responses are available at <http://www.regulations.gov> under Docket No. FWS-HQ-MB-2013-0070.

*Comment:* Sixty commenters stated that invasive species have a negative impact on the environment and need to be controlled.

*Response:* We agree that invasive species control is necessary to restore healthy, functioning, native ecosystems that have been negatively affected by their introduction. The Service is directed by the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 et seq.), MBTA, internal directives and policies, and Executive Order 13112 (“Invasive Species”) to take actions necessary to control damage caused by introduced species.

*Comment:* Fifty-two commenters stated that action needs to be taken to protect native birds, endangered and threatened species, and/or fragile native ecosystems.

*Response:* We agree that action needs to be taken to protect native and imperiled species and ecosystems. It is the responsibility of the Service to direct and implement the actions necessary to accomplish protection and restoration of native species.

*Comment:* Thirty-six commenters were opposed to lethal take for any reason, wanted more information about nonlethal control methods, and/or stated that the control order demonstrates disregard for the value of birds.

*Response:* Lethal take is initiated after nonlethal control alone has been shown to be ineffective or unfeasible. Nonlethal attempts to control cattle egrets and barn owls that have been implemented include habitat alterations, changes in management practices, and hazing by humans and/or noise-making devices. Live-capture and relocation, and sterilization were also considered.

Habitat alteration at nest or roost sites typically targets removal of roost or nest trees. This may be done on wildlife management areas and is consistent with successful habitat management for wetland birds and seabirds. However, not all nest and roost sites are located on public land and removing the appropriate structure(s) is often not possible. Furthermore, this technique does not necessarily resolve depredation problems because cattle egrets and barn owls can travel considerable distances to forage.

Management practices are altered to the extent possible as another nonlethal approach. Vegetation disturbance caused by tractors and other heavy equipment, for example, reduces concealment cover to waterbird chicks and other sensitive wildlife native to Hawaii and exposes them to increased risk of predation by cattle egrets. Wildlife managers believe that cattle egrets are attracted to tractors and other heavy equipment, and have observed them following the equipment and preying upon waterbird chicks exposed or disturbed by the activity. In response, managers have attempted to minimize this impact by avoiding the use of heavy equipment during periods when chicks

are most vulnerable. Some sensitive species nest throughout the year in Hawaii, however, and chicks may be present throughout the year, which complicates habitat management strategies and achievement of already challenging goals. Further, once cattle egrets have learned that prey is available in an area, they return to forage even when the heavy equipment is no longer present.

Active nonlethal techniques, such as hazing using noise-making devices, can be an effective method in some circumstances. However, they are not species-specific and disturb all wildlife, not just cattle egrets and barn owls. On wildlife management areas and other public lands, active nonlethal techniques, may therefore, incidentally harass or harm the species that were intended to be protected.

We considered trap and relocation of cattle egrets and/or barn owls. These species, however, cannot be relocated within the Hawaiian archipelago, due to their ability to travel between islands, return to the site from which they were captured, and perpetuate the conflict with endangered and threatened species. The Service contacted government and nongovernment organizations located in the continental United States and Canada where populations of barn owls are locally endangered in order to examine the potential that owls captured in Hawaii might contribute to conservation efforts in those populations through relocation, reintroduction, translocation, or head-starting programs. As of publication of this final rule, no other locations or agencies have agreed

to accept relocated birds.

Sterilization was also proposed as an alternative to lethal take. However, sterilizing cattle egrets and barn owls does not stop them, in the short term, from preying upon native wildlife.

Lethal take of problem individuals is highly feasible, has been effective in reducing predation of sensitive species, and has therefore proven to be a useful wildlife management strategy in many instances. The use of lethal take does not reflect any individual preference for certain species. The Service works toward conservation of all species protected by the MBTA and ESA, and only employs lethal take as a management strategy when it can be accomplished without causing detrimental population-level effects to any protected species. Lethal take could involve egg oiling, egg and nest destruction, the use of firearms, trapping, cervical dislocation, and other methods. All individuals and agencies participating in lethal take activities will be required to use humane methods of capture and euthanasia, and to adhere to the American Veterinary Medical Association Guidelines on euthanasia.

*Comment:* Thirty-five commenters were concerned about other impacts to endangered and threatened species and felt those should be prioritized.

*Response:* The Service seeks to implement actions to assist in the recovery of endangered and threatened species and the conservation of other protected wildlife. The

Service works cooperatively with multiple entities on actions such as constructing predator-proof fencing, protecting and restoring wildlife habitat, researching disease, and engaging in predator control whenever possible. The Service can lethally take other predators, such as mongooses and cats, on Service lands and is supportive of predator management as allowed elsewhere in Hawaii. We agree that predator control without adequate habitat protection measures will not be effective in conserving and restoring endangered and threatened species. Likewise, habitat conservation alone without adequate predator control will not be effective in conserving and restoring populations of endangered and threatened species. Lethal take of cattle egrets and barn owls in Hawaii is just one part of the Service's efforts to meet its various obligations, including protection and restoration of endangered and threatened species populations and habitat, protection of native migratory bird species, and management of National Wildlife Refuges.

*Comment:* Thirty-three commenters stated that we should not call barn owls or cattle egrets “invasive,” and/or that we should not manage native and nonnative species differently, stating that invasive species now represent a natural balance in the environment.

*Response:* The terms used in this rule and the environmental assessment (EA) were selected to be consistent with the MBTA, Executive Order 13112, and Service



regulations and policy. The following terms are defined in Executive Order 13112:

- “Introduction” means the intentional or unintentional escape, release, dissemination, or placement of a species into an ecosystem as a result of human activity.
- “Native species” means, with respect to a particular ecosystem, a species that, other than as a result of an introduction, historically occurred or currently occurs in that ecosystem.
- “Alien species” means, with respect to a particular ecosystem, any species, including its seeds, eggs, spores, or other biological material capable of propagating that species, that is not native to that ecosystem.
- “Invasive species” means an alien species whose introduction does or is likely to cause economic or environmental harm or harm to human health.

Cattle egrets and barn owls were intentionally introduced to Hawaii in the late 1950s, in attempts to control rodents in sugar cane fields and horn flies on cattle, and meet the criteria of alien as they thrive and propagate in Hawaii. Barn owls and cattle egrets meet the criteria of invasive, as they cause environmental harm. This is described in the EA: “Predation by cattle egrets and barn owls is currently having a direct, detrimental impact on numerous threatened or endangered species in the Hawaiian Islands.”

The introduction of alien species can cause environmental or ecological harm if

they become invasive. Invasive species have traits or combinations of traits that facilitate a competitive advantage in acquiring limited resources and enable them to quickly proliferate in their introduced environment. As invasive species flourish, they also tend to degrade, change, or displace native wildlife and habitats, resulting in a loss of biodiversity and ecosystem services.

The purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. Imperiled Hawaiian species are directly preyed upon by invasive species and also depend on an ecosystem of native flora and fauna that is disrupted and displaced by invasive species. The changes to the native ecosystem that occur as a result of invasive species introductions hinder or prevent the protection and recovery of endangered and threatened species. Removal of cattle egrets and barn owls is one step in restoring native Hawaiian ecosystems.

*Comment:* Thirty commenters expressed concern about growth of pest populations that could result from removal of barn owls and cattle egrets (such as rodents, insects, coqui, cane toad), and or spread of zoonotic disease from these pest species.

*Response:* We recognize that the barn owl and cattle egret have value to many people. While cattle egrets and barn owls were brought to the Hawaiian Islands with good intent, they do not serve the purpose for which they were released. As explained in

the EA, populations of other invasive species such as rats, mice, and coqui in Hawaii have spread independently of, and in spite of, the presence of barn owls or cattle egrets. Conversely, endangered and threatened seabird and waterbird populations are being adversely affected by barn owls and cattle egrets. Cattle egrets and barn owls are opportunistic predators and preferentially choose the prey that is easiest to capture. Native birds, especially juvenile waterbirds and nesting seabirds are less mobile and easier to catch than rodents. Cattle egrets and barn owls that have learned to successfully prey upon avian species will generally continue to do so.

Cattle egrets and barn owls do not protect humans against diseases and parasites. According to the Hawaii Department of Health, rat lungworm disease is spread to humans through ingestion of slugs on unwashed produce. Practicing hygienic food preparation is the best defense against lungworm, regardless of location. Leptospirosis is spread in soil or fresh water contaminated by any infected mammal, including domestic livestock and pets. A 10-year study conducted in Hawaii from 1999–2008 documented an average leptospirosis case rate of 1.63 people per 100,000 per year. Information on preventing and recognizing both rat lungworm disease and leptospirosis is available through the Hawaii Department of Health and summarized in the following online brochures: <http://health.hawaii.gov/san/files/2013/06/ratlungworm-bulletin.pdf> and <http://health.hawaii.gov/about/files/2013/06/leptobrochure.pdf>.

*Comment:* Twenty-four commenters stated that they do not believe that barn owls or cattle egrets prey upon native birds, and/or are concerned that the proposed rule contains vague language (*e.g.* may cause mortality, is believed to be significant, could impact, etc.).

*Response.* The assertion that these species do not prey upon birds is incorrect. As noted in the EA, cattle egrets and barn owls have become an increasing problem in efforts to protect and restore endangered and threatened species in Hawaii. Although cattle egrets and barn owls prey primarily on rodents and insects in their natural ranges, where they have been introduced to Hawaii they have adapted to the available prey base, which includes birds.

As presented in the EA, credible, trained, educated scientific professionals have documented repeated occurrences of predation and response, including through examination of remains and owl pellets, personal observations, and photographs obtained with remote cameras. Predation has been documented since the 1970s on all the main Hawaiian Islands as well as on islands in the Northwestern Hawaiian Islands. Cattle egrets and barn owls have been documented preying upon endangered and threatened waterbirds and seabirds, including Hawaiian stilt (*Himantopus mexicanus* (=himantopus) *knudseni*), Hawaiian coot (*Fulica americana alai*), Hawaiian common moorhen (*Gallinula chloropus sandvicensis*), Hawaiian duck (*Anas wyvilliana*), Hawaiian petrel

(*Pterodroma sandwichensis*), and Newell's Townsend's shearwater (*Puffinus auricularis newelli*). Hawaiian honeycreeper (species unknown) bones have also been found in barn owl pellets. Cattle egrets and barn owls are opportunistic predators and preferentially choose the prey that is easiest to capture.

In addition to expert and agency information, we did use available peer-reviewed literature, as noted in the Literature Cited section of the final EA. Regulations, such as control orders, are reevaluated as relevant research and information becomes available. In the event that new information becomes available, we will take that into consideration when we review this control order in the future. In all scientific work there is some chance that an unknown variable has been introduced. In the interest of being fully transparent in our work, we acknowledge that chance by not using absolute terminology in our writing. We recognize that communicating that uncertainty can be unsettling, but it is consistent with the scientific approach.

*Comment:* Twenty commenters misinterpreted our proposed rule to state that lethal take will be open to the public with no limitations, and/or would result in complete eradication of cattle egrets and barn owls.

*Response:* Enactment of this control order does not remove the cattle egret or the barn owl from the list of species protected by the MBTA. Neither does this ruling allow private citizens to capture, kill, or harm cattle egrets or barn owls. Barn owls and cattle

egrets and their parts, nests, and eggs remain protected under Federal law, and may not be taken or possessed without a Federal permit. The provisions of the MBTA allow the Federal Government to issue permits or control orders in specific circumstances. The purpose of this control order is to comply with that requirement while easing the administrative burden on those agencies already charged with endangered and threatened species protection and invasive species control. Authorization to lethally take cattle egrets and barn owls without a permit will be restricted to agencies with authority and responsibility for managing wildlife and invasive species. Those authorized agencies are identified in the control order. The control order will not authorize lethal take of cattle egrets and barn owls by private citizens or by any group not specifically identified in the control order. Any individual not designated to act on behalf of one of the agencies specifically identified in the control order will not be allowed to take or possess cattle egrets or barn owls, their parts, nests, or eggs without a Federal permit. Doing so without the necessary authorization is a violation of the MBTA.

Lethal take of cattle egrets and barn owls will only be authorized in Hawaii where both species are considered invasive. Cattle egrets and barn owls have substantial populations where they naturally exist, and this rule does not authorize lethal take in those areas.

*Comment:* Fourteen commenters stated that lethal take should be limited to problem individuals, and/or stated that they do not believe the same situation exists or the same methods should be employed on different parts of the island chain.

*Response:* The evidence of predation is not solely from any one part of the Hawaiian archipelago. We have documentation of the effects of barn owls and cattle egrets on the main Hawaiian Islands and in the Northwestern Hawaiian Islands. As described in the EA, this evidence includes collected remains, collected owl pellets, personal observations, and photographs obtained with remote cameras.

The intent of this control order is to provide a tool to allow removal of individuals and populations which have learned to prey upon and specifically target the State's endangered and threatened species. The individuals and/or populations that have learned to prey upon avian species will be the focus of lethal take efforts. This will occur primarily on public land, but may occur on private land with landowner approval. Barn owls and cattle egrets that are on private property and not foraging on native birds will not be the focus of lethal take efforts.

*Comment:* Thirteen commenters specifically agreed that cattle egrets and barn owls prey upon native birds and/or had personal evidence of this.

*Response:* We agree.

*Comment:* Eleven commenters were concerned that the decision was made in haste or without adequate public outreach.

*Response:* This decision has been thoroughly considered by State and Federal wildlife management agencies in Hawaii, incorporating the best available science as well as the perspectives of the public. As previously stated, predation has been documented since the 1970s on all the main Hawaiian Islands as well as on islands in the Northwestern Hawaiian Islands chain. The problems created by cattle egrets and barn owls have been well documented and were analyzed in the EA. We published our proposal in the **Federal Register** and allowed 90 days for public comment. Public comments received during that period have been reviewed and incorporated, as appropriate, in our final EA and this final rule.

*Comment:* Eight commenters stated that the proposal circumvents the regulatory process or do not understand which regulations are applicable.

*Response:* Regulation and management of barn owls and cattle egrets in the United States is the responsibility of the Service. The Service operates under many directives. Many are from Congress, such as the National Environmental Policy Act (42 U.S.C. 4321 et seq.), MBTA, ESA, and the Wild Bird Conservation Act (16 U.S.C. 4901 et seq.). Others are from the Executive Branch of the U.S. Government, such as Executive Orders or Secretarial Orders. In this case, cattle egrets and barn owls are



protected under the MBTA, but the MBTA also allows for take of protected species when responsible management dictates it is necessary, such as in the case of protecting endangered and threatened species from extinction. Killing birds protected under the MBTA is illegal, “[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter” (16 U.S.C. 703(a)). Executive Order 13112 directs Federal agencies to control populations of invasive species in a cost-effective and environmentally sound manner in order to minimize the effects of invasive species, including ecological effects. In most circumstances, a permit is necessary to legally take or possess a species protected by the MBTA. However, for MBTA species subject to control or depredation orders, an individual specifically authorized by the order may take or possess that species without a Federal permit, so long as the regulatory requirements and restrictions of the order are complied with.

When this rule becomes effective (see **DATES**, above), there will be 12 depredation and control orders authorized under the MBTA. Each order is assigned its own section in the Code of Federal Regulations (CFR), from 50 CFR 21.42 through 21.54, with this rule adding § 21.55. Sections 21.42 and 21.45 are currently “reserved,” meaning they do not contain a depredation order. Eight of the current orders are for a single species (§§ 21.47 through 21.54), one is for two species (§ 21.46), and two are for multiple species (§§ 21.43 and 21.44). Two of these orders apply only in a specific State,

one is for two States, three are for a described region of the United States, and seven authorize take nationwide. Six of these control orders were created to protect multiple agriculture, aquaculture, or horticulture interests; two are for a specific crop or specific type of crop; four are for protection of human health; one is to protect personal property; two are for protection of fish, wildlife, native plants, and their habitats; and two allow take to alleviate any type of nuisance. As stated above, this rule adds a new control order at 50 CFR 21.55 authorizing lethal take of two nongame species in a specified geographic region for the protection of endangered and threatened wildlife resources. We did not claim that cattle egrets or barn owls caused harm to humans or agricultural interests, and that is not required for us to adopt this rule.

Birds federally protected by the MBTA, including barn owls and cattle egrets, are under Federal jurisdiction wherever they occur, even on private property. However, this rule does not grant access to private property. This control order requires landowner permission for employees or agents of the authorized agencies to enter private property for the purpose of capturing or killing cattle egrets or barn owls.

This control order is a Federal regulation under the provisions of the MBTA. No review by the State of Hawaii is required for the Federal government to implement this regulation. However, the State of Hawaii supports this regulation and is a cooperating agency on the EA.

Department of the Interior regulations state, “[t]he purpose of an environmental assessment is to allow the Responsible Official to determine whether to prepare an environmental impact statement or a finding of no significant impact” (43 CFR 46.300). Through the analysis in the EA we were able to make a finding of no significant impact (FONSI, online at <http://www.regulations.gov> under Docket No. FWS–HQ–MB–2013–0070). This action will have no significant environmental effects other than the desired effect of reduced populations of the two invasive species and reduced predation on endangered and threatened species. An environmental impact statement for this action is not required.

*Comment:* Five commenters were concerned about the cultural significance of owls and confused the invasive barn owl with the native Hawaiian short-eared owl (pueo; *Asio flammeus sandwichensis*).

*Response:* Hawaiian cultural practices have been considered in writing this rule. Many of the individuals who assisted in writing the control order and EA are practitioners of traditional Hawaiian culture as well as employed in environmental fields. It is possible that some people confuse the barn owl with the native pueo, or Hawaiian short-eared owl. The pueo has existed in Hawaii throughout human history and is honored in Hawaiian culture. The barn owl, however, has only occurred in Hawaii since the late 1950s, and is not traditionally associated with Hawaiian cultural practices.

We acknowledge that some people may find pleasure in seeing the two invasive species. However, native Hawaiian birds are an integral part of daily life and the cultural traditions of Hawaiians. The primary purpose of this control order is to protect seabirds and waterbirds native to Hawaii, and thereby keeps in step with Hawaiian cultural traditions. Historically, seabirds were used by Hawaiians to navigate back to land from fishing or trading voyages and to lead fishermen to schools of fish, as well as being a source of food and feathers. Waterbirds were also of great importance. In Hawaiian mythology, a moorhen brought fire to humans, which explains the red on its forehead, a symbol of the scorching from the fire. The Hawaiian coot and Hawaiian moorhen are sacred to Hina, a Hawaiian Earth-mother category of goddess who can take the form of these birds. The eggs of these birds were traditionally used in ceremonies to consecrate chiefs and priests. The Hawaiian stilt is sacred to the Hawaiian god Ku, in his form as a fisherman. These birds are a culturally significant and endangered resource. They are being preyed upon by invasive cattle egrets and barn owls. Lethal take of the two invasive species is much needed in Hawaii for protection of the native bird species, including endangered and threatened species, not only for their own sake, but also to protect cultural practices.

*Comment:* Four commenters specifically noted the isolation of the Hawaiian Islands as an environment amenable to the control proposed.

*Response:* We agree that the remoteness and isolation of the Hawaiian Islands greatly decreases the likelihood that individual cattle egrets and barn owls from other populations will emigrate to the islands, supplementing current populations. However, the goal of this control order is population control rather than eradication, where needed, to enhance endangered species recovery. The potential emigration of a few individuals is less of a concern in such cases.

*Comment:* Three commenters were concerned about global barn owl or cattle egret populations.

*Response:* Distribution and abundance of global cattle egret and barn owl populations was thoroughly researched in preparing the control order and EA. As noted in the EA, both cattle egrets and barn owls have stable, cosmopolitan distributions with global populations between 5 and 8 million individuals. Cattle egrets and barn owls are both listed as “Species of least concern” by the International Union for the Conservation of Nature (IUCN). The number of cattle egrets and barn owls removed from the Hawaiian Islands as a result of this control order will not have a significant negative impact on global populations of either species.

As previously noted, we considered the option of live-trapping and relocating barn owls from Hawaii to areas in the continental United States and Canada where barn owls and cattle egrets are considered locally rare. As of publication of this final rule, no

other locations or agencies have agreed to accept relocated birds.

*Comment:* Three commenters were concerned that the actions outlined in the proposed rule would negatively impact endangered and threatened species.

*Response:* We completed consultation as required under section 7 of the ESA to ensure that the proposed rule would not jeopardize the existence of endangered or threatened species in Hawaii. The analysis in the environmental assessment supporting the proposed rule concludes that the rule would have only beneficial effects on listed species in Hawaii; the expected beneficial effects to listed species are, in part, why this rulemaking has been undertaken. Our internal consultation determined that the proposed rule may affect, but is not likely to adversely affect, listed endangered, threatened, proposed to be listed, or candidate birds; the Hawaiian hoary bat (*Lasiurus cinereus semotus*); and invertebrates species, and their designated critical habitats in Hawaii. We also determined there would be no effects on ESA-listed plants. The National Marine Fisheries Service (NMFS) concurred with our determination that the proposed rule may affect, but is not likely to adversely affect, any endangered or threatened species under their jurisdiction, or adversely modify any designated critical habitat. We further outlined best management practices that will be required by participating agencies when implementing the control order to minimize any effects to ESA-listed species or their designated critical habitats.

*Comment:* Three commenters specifically noted approval of lethal control as a valid management technique.

*Response:* We agree.

### **III. Changes from Proposed Rule**

We made several changes from what we proposed to what we are making final in this rule. Specifically, we changed the name of the control order to more accurately and intentionally identify the kind of impact some introduced, nonnative species of birds have in Hawaii. The new title also references Executive Order 13112, “Invasive Species,” an underpinning of this rulemaking. We reordered the list of authorized agencies at §21.55(b) so that they appear in alphabetical order. Under §21.55(c), *Means of take*, we made changes to the description to more clearly distinguish between the take of birds versus active nests, and we added authorization to use concealment (such as blinds) in the course of taking birds under this control order; concealment is a prohibited practice under depredation permits (50 CFR 21.41(c)(3)), so specifically authorizing the use of blinds or other means of concealment expands the range of tools available to take cattle egrets and barn owls, and is one of several ways that this control order will improve the control of these invasive species compared to their control under depredation permits. We also changed “eggs” to “nest contents” in the title of, and description under,

§21.55(g); nests may include hatched young, not just eggs, and so this change accurately describes what we originally intended in the proposed rule. Finally, we lengthened the time allowed for reporting the take of nontarget birds under §21.55(i) from “immediately” in the proposed rule to “within 72 hours” in this final rule, because if we had retained “immediately,” compliance would have been difficult to achieve for activities taking place in remote locations.

#### **IV. This Rule**

Cattle egrets and barn owls are invasive in Hawaii and threaten native wildlife with extinction. Nonlethal methods have been unsuccessful in reducing the impacts caused by cattle egrets and barn owls. We, therefore, are making final a regulation that allows take by agencies that have functional and/or jurisdictional responsibility for controlling invasive species and protecting native species in the Hawaiian Islands. The control methods we authorize are similar to measures allowed in other control orders and encompass a suite of techniques that give wildlife managers flexibility in achieving control of invasive species while avoiding or minimizing significant impacts to native species.

#### **V. Required Determinations**

*Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 (E.O. 12866) provides that the Office of Information and



Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 (E.O. 13563) reaffirmed the principles of E.O. 12866, and called for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 further emphasizes that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

#### *Executive Order 13771*

This action is considered to be an E.O. 13771 deregulatory action (82 FR 9339, February 3, 2017). Consistent with E.O. 13771, at a minimum, we estimate the annual cost savings for this final rule to be \$6,726.72. This estimate includes the current time spent by entities in applying for depredation permits and meeting reporting requirements and by the Service in issuing the permits. We multiplied the per-applicant cost of \$517.44 per permit times 13, which is the average number of depredation permits that we

issue per year to address the cattle egret and barn owl issues in Hawaii.

*Executive Order 13112—Invasive Species*

This rule supports and enacts mandates of invasive species control detailed in Executive Order 13112 of February 3, 1999 (64 FR 6183; February 8, 1999). Section 2 directs Federal agencies whose actions may affect the status of invasive species to take certain actions. These agencies, to the extent practicable and permitted by law and subject to the availability of appropriations and within Administration budgetary limits, should use relevant programs and authorities to:

- (i) prevent the introduction of invasive species;
- (ii) detect and respond rapidly to and control populations of such species in a cost-effective and environmentally sound manner;
- (iii) monitor invasive species populations accurately and reliably; and
- (iv) provide for restoration of native species and habitat conditions in ecosystems that have been invaded.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104-121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory

flexibility analysis that describes the effect of the rule on small businesses, small organizations, and small government jurisdictions. However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We have identified no small entities that this regulation could impact. Therefore, this regulation change will not have a significant economic impact on a substantial number of small entities, so a regulatory flexibility analysis is not required.

This is not a major rule under the SBREFA (5 U.S.C. 804(2)). It will not have a significant impact on a substantial number of small entities:

- This rule will not have an annual effect on the economy of \$100 million or more;
- This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, Tribal, or local government agencies, or geographic regions; and
- This rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises

to compete with foreign-based enterprises.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we have determined the following:

- This rule will not affect small governments. A small government agency plan is not required. Allowing control of invasive migratory bird species will not affect small government activities; and
- This rule will not produce a Federal mandate. It is an authorization to take voluntary action, not a requirement to act. It is not a significant regulatory action.

*Takings*

This rule does not contain a provision for taking of private property. In accordance with Executive Order 12630, a takings implication assessment is not required.

*Federalism*

This rule does not have sufficient Federalism effects to warrant preparation of a federalism summary impact statement under Executive Order 13132. It will not interfere with the State's ability to manage itself or its funds. No significant economic impacts are expected to result from the regulations change.

*Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has

determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Paperwork Reduction Act of 1995*

This rule does not contain any new collections of information that requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) and a submission to the OMB under the PRA is not required. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

We have analyzed this rule in accordance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) and U.S. Department of the Interior regulations at 43 CFR part 46. We have completed an environmental assessment of the rule change and a findings document, a finding of no significant impact (FONSI), which are available at <http://www.regulations.gov> under Docket No. FWS-HQ-MB-2013-0070. We conclude that our preferred alternative will have the following impacts:

*Socioeconomic.* The regulation change will have no discernible socioeconomic impacts.

*Migratory bird populations.* The regulation change will not negatively affect

native migratory bird populations. Cattle egret and barn owl, the subjects of control, are alien and invasive to Hawaii.

*Endangered and threatened species.* The regulation change will have an overall benefit to endangered or threatened species or habitats important to them by reducing predation and competition by the cattle egret and the barn owl.

We concluded in a finding of no significant impact that the action is not likely to adversely affect any endangered or threatened species.

*Government-to-Government Relationship with Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and 512 DM 2, we determined that there are no potential effects on federally recognized Indian Tribes from the regulation change. The regulation change will not interfere with Tribes' abilities to manage themselves or their funds, or to regulate migratory bird activities on tribal lands.

*Energy Supply, Distribution, or Use (Executive Order 13211)*

This rule will not affect energy supplies, distribution, or use. This action will not be a significant energy action, and no Statement of Energy Effects is required.

*Compliance with Endangered Species Act Requirements*

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C.

1531 et seq.), requires that “The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter” (16 U.S.C. 1536(a)(1)). It further states that the Secretary must “insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat” (16 U.S.C. 1536(a)(2)). We completed informal consultation on this action; internally we concluded that this action would have “no effect” on ESA-listed plants, and “may affect but is unlikely to adversely affect” ESA-listed birds, the Hawaiian hoary bat, invertebrates, their designated critical habitats, and those proposed for listing. NMFS concurred with our determination that actions under this regulation are “not likely to adversely affect” ESA-listed marine species. The regulation change will result in an overall benefit to listed species or habitats important to them by reducing predation and competition by the cattle egret and the barn owl.

#### **List of Subjects in 50 CFR Part 21**

Exports, Hunting, Imports, Reporting and recordkeeping requirements,  
Transportation, Wildlife.

#### **Regulation Promulgation**

For the reasons described in the preamble, we amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## **PART 21—MIGRATORY BIRD PERMITS**

1. The authority for part 21 continues to read as follows:

Authority: 16 U.S.C. 703–712.

2. Add § 21.55 to read as follows:

### **§ 21.55 Control order for invasive migratory birds in Hawaii.**

(a) *Control of cattle egrets and barn owls.* Personnel of the agencies listed in paragraph (b) of this section may take cattle egrets (*Bubulcus ibis*) or barn owls (*Tyto alba*) using the methods authorized in paragraph (c) of this section at any time anywhere in the State of Hawaii, the Northwestern Hawaiian Islands, or the unincorporated territory of Midway Atoll. No permit is necessary to engage in these actions. In this section, the word “you” means a person operating officially as an employee of one of the authorized agencies.

(b) *Authorized agencies.* (1) Federal Aviation Administration;

(2) Hawaii Department of Agriculture;

(3) Hawaii Department of Lands and Natural Resources, Division of Forestry and Wildlife;

(4) National Oceanic and Atmospheric Administration;

(5) National Park Service;

(6) U.S. Department of Agriculture—Animal and Plant Health Inspection Service,



Wildlife Services;

(7) U.S. Department of Defense;

(8) U.S. Fish and Wildlife Service;

(9) U.S. Geological Survey; and

(10) University of Hawaii—Pacific Cooperative Studies Units with program mandates to accomplish invasive species eradication and control, including the five island Invasive Species Committees.

(c) *Means of take.* (1) You may take cattle egrets and barn owls by means of lethal take or active nest take. Lethal take may occur by firearm or slingshot in accordance with paragraph (c)(2) of this section or lethal or live traps. Active nest take may occur by egg oiling in accordance with paragraph (c)(3) of this section or destruction of nest material and contents (including viable eggs and chicks). Birds may be euthanized by cervical dislocation, CO<sub>2</sub> asphyxiation, or other recommended method in the American Veterinary Medical Association Guidelines on Euthanasia.

(2) If you use a firearm or slingshot to kill cattle egrets or barn owls under the provisions of this order, you must use nontoxic shot or nontoxic bullets to do so. See § 20.21(j) of this chapter for a list of approved nontoxic shot types.

(3) Eggs must be oiled with 100 percent corn oil, which is exempted from regulation under the Federal Insecticide, Fungicide, and Rodenticide Act by the U.S.

Environmental Protection Agency.

(4) You may use concealment (such as blinds) and luring devices (such as decoys or recorded calls) for locating, capturing, and/or taking cattle egrets or barn owls.

(d) *Land access.* You must obtain appropriate landowner permission before conducting activities authorized by this order.

(e) *Relationship to other regulations.* You may take cattle egrets and barn owls under this order only in a way that complies with all applicable Federal, State, county, municipal, or tribal laws. You are responsible for obtaining all required authorizations to conduct this activity.

(f) *Release of injured, sick, or orphaned cattle egrets or barn owls.* Wildlife rehabilitators, veterinarians, and all other individuals or agencies who receive sick, injured, or orphaned cattle egrets or barn owls are prohibited from releasing any individuals of those species back into the wild in the State of Hawaii, the Northwestern Hawaiian Islands, or the unincorporated territory of Midway Atoll. All applicable local, State, Federal, and/or territorial regulations must be followed to transfer, possess, and/or release cattle egrets or barn owls in any other location.

(g) *Disposal of cattle egret or barn owl carcasses, nests, or nest contents.* You may donate carcasses, nests, or nest contents taken under this control order to public museums or public institutions for scientific or educational purposes or to persons

authorized by permit or regulation to possess them. You may dispose of the carcasses by burial or incineration; or, if the carcasses are not safely retrievable, you may leave them in place. No one may retain for personal use, offer for sale, barter or trade, or sell a cattle egret or a barn owl or any feathers, parts, nests, or nest contents taken under this section.

(h) *Endangered or threatened species.* You may not take cattle egrets or barn owls if doing so will adversely affect other migratory birds protected under the Migratory Bird Treaty Act or species designated as endangered or threatened under the authority of the Endangered Species Act.

(i) *Reporting take.* Any agency engaged in control activities under this control order must provide an annual report of take during the calendar year for each species by January 31st of the following year. The report must include a summary of the number of birds and number of active nests taken for each species, the months in which they were taken, and the island(s) on which they were taken. Multiple reports within agencies may be combined, as appropriate. Submit annual reports to the Pacific Region Migratory Bird Permit Office in Portland, Oregon, at the address shown at 50 CFR 2.2.

(j) *Reporting nontarget take.* If, while operating under this control order, you take any other species protected under the Endangered Species Act or the Migratory Bird Treaty Act, you must report within 72 hours the take to the Pacific Region Migratory Bird Permit Office in Portland, Oregon, at the address shown at 50 CFR 2.2.

(k) *Revocation of authority to operate under this order.* We may suspend or revoke the authority of any individual or agency to operate under this order if we find that the individual or agency has taken actions that may take federally listed endangered or threatened species or any other bird species protected by the Migratory Bird Treaty Act (see 50 CFR 10.13 for the list of protected migratory bird species), or has violated any Federal or State law or regulation governing this activity. We will notify the affected agency by certified mail, and may change this control order accordingly.

Dated: July 13, 2017.

Virginia H. Johnson,

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.*

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